16
Supreme Court, U.S.
FILED
APR 26 1996
CLERK

No. 95-992

IN THE

# Supreme Court Of The United States

October Term, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,

*Appellants,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

## Brief for Appellant Time Warner Entertainment Company, L.P.

BRIAN CONBOY
THEODORE CASE WHITEHOUSE
WILLKIE FARR & GALLAGHER
Three Lafayette Center
1155 21st Street, N.W.
(Suite 6000)
Washington, DC 20036-3384
(202) 328-8000

ROBERT D. JOFFE*
STUART W. GOLD
ROWAN D. WILSON
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1000

*Counsel for Appellant Time Warner Entertainment Company, L.P.*

*Counsel of Record

April 26, 1996

COPY

## QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require all cable operators to carry local broadcast stations in preference to all other programming in the absence of evidence that the economic health of the local broadcasting system is in genuine jeopardy or in need of the protection afforded by forced cable carriage.

## PARTIES TO THE PROCEEDING

Appellants:*

Atlanta Interfaith Broadcasters, Inc.
A&E Television Networks
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Lifetime Entertainment Services
International Family Entertainment, Inc.
The Learning Channel, Inc.
National Cable Satellite Corporation d/b/a C-SPAN
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC, Inc.
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Networks

Appellees:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network

---

* Appellant Time Warner Entertainment Company, L.P.'s ("Time Warner" or "TWE") Rule 29.6 disclosure statement is set forth in the Appendix to the Jurisdictional Statement at 147a-148a.



International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | vii |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT | 1 |
| A. Introduction | 1 |
| B. The First *Turner* Opinion | 2 |
| C. The Decision On Remand | 4 |
| Summary Of The Argument | 8 |
| Argument | 12 |
| I. MUST-CARRY DOES NOT FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST BECAUSE THE LOCAL BROADCASTING SYSTEM IS NOT IN GENUINE JEOPARDY | 12 |
| A. The Local Broadcasting System Thrived In The Absence Of Must-Carry | 12 |
| 1. Significant entry occurred | 13 |
| 2. Broadcast stations had strong financial performance | 15 |
| 3. Broadcast television advertising revenues grew steadily | 16 |
| 4. A major new network emerged | 17 |





| | Page |
|---|---|
| 5. Broadcast stations elect retransmission consent in large numbers | 17 |
| B. Cable Operators Voluntarily Carry The Vast Majority Of Broadcast Stations | 18 |
| C. The Few Broadcast Stations Denied Carriage In The Absence Of Must-Carry Did Not Deteriorate To A Substantial Degree | 20 |
| D. The Local Broadcasting System Is Not At Risk Of Some Future Harm | 22 |
| II. MUST-CARRY CANNOT BE UPHELD ON THE GROUND THAT IT PROMOTES THE SPEECH OF A SMALL NUMBER OF MARGINAL BROADCASTERS | 26 |
| A. The Defendants Improperly Reformulated Their Burden Below | 26 |
| B. Congress Cannot Favor Marginal Broadcasters Without Establishing A Compelling Interest In Such Favoritism, Which It Cannot | 31 |
| C. Defendants' Newly Claimed Interest Does Not Address A Real Problem | 34 |
| III. THE MUST-CARRY PROVISIONS ARE NOT NARROWLY TAILORED TO FIT ANY OF THE INTERESTS POSITED BY DEFENDANTS | 34 |
| A. The Must-Carry Provisions Are Overbroad | 34 |

Page

B. The Must-Carry Provisions Do Not Protect Even Marginal Broadcast Stations In A Direct And Material Way .... 38

IV. THE MUST-CARRY PROVISIONS IMPOSE A SUBSTANTIAL BURDEN ON THE PROTECTED SPEECH OF CABLE OPERATORS AND PROGRAMMERS ..... 39

A. Must-Carry Severely Restricts The Editorial Discretion Of Cable Operators .... 39

B. Cable Operators Cannot Meet Their Must-Carry Obligations Through "Unused" Channels ..... 41

C. Must-Carry Substantially Burdens Programmers' First Amendment Rights .... 43

D. Judge Sporkin Grossly Undervalued The First Amendment Harm To Cable .... 44

V. THERE ARE LESS RESTRICTIVE ALTERNATIVES THAT ARE NONETHELESS EFFECTIVE ..... 45

1. Subsidies ..... 45

2. Direct Regulation of Competition ..... 46

VI. THE LOW POWER CARRIAGE OBLIGATIONS AND MARKET MODIFICATION PROVISIONS ARE CONTENT-BASED ..... 47

VII. THE DISTRICT COURT HAD JURISDICTION OVER TIME WARNER'S TAKINGS CLAIM ..... 48

Conclusion ..... 50




## TABLE OF AUTHORITIES


| Cases | Page(s) |
|---|---|
| *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) | 47 |
| *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600 (W.D. Mich. 1989) | 47 |
| *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) | 29 |
| *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) | 29 |
| *Buckley v. Valeo*, 424 U.S. 1 (1976) | 11, 31 |
| *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032 (1988) | 2 |
| *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) | 35 |
| *Edenfield v. Fane*, 507 U.S. 761 (1993) | 3, 10, 27 |
| *Elrod v. Burns*, 427 U.S. 347 (1976) | 44 |
| *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) | 29 |
| *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711 (1992) | 32 |
| *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) | 12 |
| *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141 (5th Cir.), *cert. denied*, 449 U.S. 954 (1980) | 46 |
| *Mississippi Univ. for Women v. Hogan*, 458 U.S. 728 (1982) | 27 |

| | Page(s) |
|---|---|
| *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) | 2, 13, 27, 32 |
| *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) | 32 |
| *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) | 35 |
| *Ruckelshaus v. Monsato Corp.*, 467 U.S. 986 (1984) | 48 |
| *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) | 12 |
| *Simon & Schuster, Inc. v. Members of the New York State Criminal Victims Bd.*, 502 U.S. 105 (1991) | 10, 27, 45 |
| *Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333 (C.D. Cal. 1992) | 47 |
| *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) | *passim* |
| *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) | 2, 46, 49, 50 |
| *Turner Broadcasting Sys., Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995) | 1 |
| *United States v. O'Brien*, 391 U.S. 367 (1968) | 27 |
| *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) | 22 |





| | Page(s) |
|---|---|
| *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) | 28 |
| *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) | 4 |
| *WLIG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229 (E.D.N.Y. 1994) | 46 |


**Statutes**


| | |
|---|---|
| 28 U.S.C. § 1253 | 1 |
| 28 U.S.C. § 1346(a)(2) | 49 |
| 28 U.S.C. § 1491 | 48 |
| 47 U.S.C. § 325(b) | 17, 18 |
| 47 U.S.C. § 521(6) | 29 |
| 47 U.S.C. § 521, note 2(a) | 22, 28, 30 |
| 47 U.S.C. § 521, note 2(b) | 29 |
| 47 U.S.C. § 534(b) | 2 |
| 47 U.S.C. § 534(h) | 5, 15, 47 |
| 47 U.S.C. § 535 | 2 |
| 47 U.S.C. § 555(c) | 48, 49 |


**Miscellaneous**


| | |
|---|---|
| H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) | 30, 37 |
| S. Rep. No. 92, 102d Cong., 1st Sess (1991) | 23, 29, 30 |
| *In Re Appl. of Univision Holdings, Inc.*, 7 F.C.C. Rcd. 6672 (1992) | 29 |

## OPINION BELOW

The opinion of the three-judge district court is reported at 910 F. Supp. 734 (D.D.C. 1995). It is reprinted in the Appendix to the Jurisdictional Statement at 1a-112a.[1]

## JURISDICTION

The judgment of the district court was entered December 20, 1995. J.S. 153a. A timely notice of appeal was filed in the district court on behalf of all Plaintiffs on December 21, 1995. J.S. 149a-152a. This Court, pursuant to 28 U.S.C. § 1253, noted probable jurisdiction on February 20, 1996.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press". The Fifth Amendment to the United States Constitution provides in part: "[N]or shall private property be taken for public use without just compensation". Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or "Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. §§ 534, 535, are reprinted at J.S. 113a-143a.

## STATEMENT

### A. Introduction.

This case presents a First and Fifth Amendment challenge to Sections 4 and 5 of the 1992 Cable Act—the so-called "must-carry" provisions. Those provisions impose the most

---

[1] Appellants' Jurisdictional Statement is cited as "J.S. ___". The Joint Appendix is cited as "J.A. ___".

far-reaching must-carry regime known to date.[2] Section 4 of the Act requires virtually every cable operator in the Nation to set aside up to one-third of its limited channel capacity for the benefit of "local commercial television stations", defined to include all full power television broadcasters. 47 U.S.C. § 534 (b), (h)(1)(A). Section 5 requires virtually every cable operator to set aside up to three channels for the benefit of local "noncommercial educational television stations" and to continue carrying all such stations whose signals were carried prior to March 29, 1990. *Id.* § 535(b), (c).

Plaintiffs' constitutional challenge to Sections 4 and 5 was originally heard by a three-judge district court, which upheld must-carry by a 2 to 1 vote. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993).

### B. The First *Turner* Opinion.

In 1994, when first reviewing Plaintiffs' First Amendment challenge to the must-carry provisions, a unanimous Supreme Court held that cable operators and programmers are full-fledged First Amendment speakers and that must-carry restricts their speech. *Turner Broadcasting Sys., Inc v. FCC*, 114 S. Ct. 2445, 2456 (1994). After reviewing the Act and its various findings, a five-Justice majority held that must-carry was content-neutral because "Congress' overriding objective was not to favor programming of a particular subject matter,

---

[2] Prior to the 1992 Cable Act, the Federal Communications Commission ("FCC") had promulgated narrower must-carry rules. Those rules were struck down on First Amendment grounds. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-63 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (finding the governmental interest unsubstantiated and the rules overinclusive under intermediate First Amendment scrutiny). In the wake of *Quincy*, the FCC promulgated still narrower rules (the so-called "*Century* rules"), which were again struck down as violating the First Amendment. *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032 (1988).



viewpoint or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable". *Id.* at 2461. Those Justices, therefore, subjected must-carry to intermediate First Amendment scrutiny, which requires Defendants to demonstrate that (1) the must-carry provisions further a substantial governmental interest that is unrelated to the suppression of free expression and (2) those provisions are narrowly tailored to further that interest. *Id.* at 2469-71 (citing *Edenfield v. Fane*, 507 U.S. 761, 767-68 (1993)). Four Justices dissented on the grounds that the provisions should be analyzed under strict First Amendment scrutiny (with three Justices convinced that must-carry could not survive even intermediate scrutiny).

Based upon the record before the Court, seven Justices found that Defendants had not met their burden under intermediate First Amendment scrutiny. In assessing the Government's asserted interest, the four-Justice plurality noted the "paucity of evidence indicating that broadcast television is in jeopardy". *Id.* at 2472. The plurality found that the Government "must do more than simply 'posit the existence of the disease sought to be cured'"—namely, the threat posed to the viability of the free, over-the-air broadcasting system by cable television. *Id.* at 2470 (citation omitted). Rather, the Government must demonstrate that the threat to the broadcasting system is "real, not merely conjectural", and that if the system is in jeopardy, that must-carry "alleviates that harm in a direct and material way", without burdening substantially more speech than is necessary. *Id.* (citations omitted). The plurality therefore vacated the decision below and ordered a remand for further development of the record "before passing upon the constitutional validity of the challenged provisions". *Id.* at 2472.[3]

---

[3] Justice Stevens would have affirmed the district court, but lest no disposition command a majority, concurred in the judgment remanding for

The plurality instructed the district court to develop the record regarding: (1) whether "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry", *id.* at 2470, and (2) whether the must-carry provisions "burden substantially more speech than is necessary to ensure the viability of broadcast television", *id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The plurality stated that the latter inquiry requires findings regarding two subsidiary issues: (1) "the actual effects of must-carry on the speech of cable operators and cable programmers" and (2) "the availability and efficacy of 'constitutionally acceptable less restrictive means'". *Id.* at 2472 (citation omitted). For each issue, the Court placed the burden of proof on the Government. *Id.* at 2470.

**C. The Decision On Remand.**

In May of 1995, after almost one year of discovery, the parties filed cross motions for summary judgment. The three-judge district court granted summary judgment to Defendants, but split three ways. Judge Sporkin upheld must-carry. Notwithstanding this Court's direction to do so, *id.*, Judge Sporkin disclaimed any need to examine the "economic health of the broadcasting industry as a whole". J.S. 9a n.11. He found the relevant inquiry to be whether "the health of those broadcasters protected by the must-carry provisions would be in jeopardy without the provisions". *Id.* Having so defined the governmental interest at stake, Judge Sporkin concluded that Defendants satisfied the first prong of intermediate scrutiny because they produced evidence "substantial" enough for Congress to draw a "reasonable inference" that cable operators would drop "significant" numbers of stations and that the economic fortune of each such station would

---

further proceedings. *Id.* at 2475.



subsequently deteriorate. J.S. 9a-18a.[4] Judge Sporkin also held that must-carry did not impose a significant burden on the speech of cable operators because many of the broadcast stations carried pursuant to must-carry were carried by cable operators prior to the enactment of those provisions. J.S. 19a. Finally, he examined five less restrictive alternatives, but rejected each, stating that "it is clear they are not in any respect as effective" as must-carry. J.S. 23a.[5]

Judge Williams found must-carry unconstitutional. He stated that this Court's "mandate" required Defendants to show that the "economic health of local broadcasting" is in genuine jeopardy. J.S. 42a, 46a-47a. He concluded that the harm purportedly addressed by must-carry was not "real" under *Turner* because "[t]he parties agree that there is no threat to the continued viability of broadcast television, either now in existence or looming on the horizon". J.S. 40a. He found that Defendants conceded that point and that the

---

[4] To support that conclusion, Judge Sporkin almost exclusively cited materials that had been available to this Court pre-remand, including a carriage survey by the FCC and testimony by an FCC commissioner. J.S. 9a-13a. Although this Court invited the parties to submit "additional evidence" on remand that was not before Congress (and the parties did so), Judge Sporkin cited only two quotes from cable executives and made a reference to a "slew of notable experts" and their credentials without mentioning or evaluating what they said. J.S. 12a-14a. He did not mention any of the evidence introduced by Plaintiffs that was available to Congress or that Plaintiffs submitted to the three-judge court.

[5] Although this Court noted that two provisions of the Act permit the FCC to grant must-carry privileges upon request to otherwise ineligible stations under standards that raised an issue regarding the "content-neutral or content-based character" of the provisions (47 U.S.C. §§ 534(h)(1)(C)(ii), (h)(2)(B)), 114 S. Ct. at 2460 n.6, and those provisions were challenged by Plaintiffs, Judge Sporkin never discussed or ruled on the former provision. He found that the other was "very close to content-based legislation triggering strict scrutiny" but "[did] not cross the line". J.S. 29a. *See infra* at pp. 47-48.

evidence developed on remand confirmed it. J.S. 50a-61a. Whatever interest there is in preventing anticompetitive behavior, Judge Williams found must-carry "plainly not a remedy narrowly tailored to any such risk". J.S. 73a.

Judge Williams observed that only if the governmental interest at stake were either the "maximum growth of broadcast, or enhancement of precisely the stations that would elect must-carry against the will of cable operators—interpretations of *Turner*'s mandate that are manifestly implausible—[could] the posited harms be viewed as real rather than conjectural". J.S. 72a-73a. If the congressional interest were the former (the "maximum growth of broadcast"), Judge Williams found that it was so "intuitive[ly] obvious[ ]" that must-carry would help some stations some of the time that this Court would not have remanded the case. J.S. 62a-63a. If the interest were the latter (to protect those stations who invoke it), he found that the Government had failed to demonstrate the importance of that interest, concluding that "[a]ll defendants have demonstrated is that, all else being equal, forced cable carriage is at least of some benefit to the broadcast stations so carried. But this alone can vindicate Congress's interest only if we take the valid interest to be, circularly, maximum possible expansion for broadcast". J.S. 66a-67a.

With respect to the harm caused to the First Amendment rights of cable operators and programmers by must-carry, Judge Williams found it undisputed that at least between 7% and 13% of available channels on cable systems nationwide were now commandeered by government fiat for the benefit of broadcasters. J.S. 91a. He concluded that the First Amendment harm was the same regardless of whether a broadcaster invoked must-carry to force its way onto a cable system or invoked must-carry to prevent its removal. *Id.* Moreover, Judge Williams found that according to Defendants' own data, the majority of cable operators do not



have unused channel capacity, J.S. 90a-91a; thus "[e]very *benefit* to a broadcast station (through being added or being sheltered against removal) is matched by an *injury* to a cable operator (in lost choice and possibly lost revenue) and programmer (through being dropped or, thanks to a broadcaster's must-carry entitlement, not added)". J.S. 92a (emphasis in original).

Turning to the issue of less restrictive alternatives, Judge Williams accepted two such alternatives as effectively furthering the Government's interest while burdening less speech. With respect to the first alternative—"the 'A/B' or input selector switch", J.S. 96a—Judge Williams found that Defendants' main objection was that consumers might not want to "get up" to use it. J.S. 106a.[6] That objection, Judge Williams concluded, hardly justified the harm caused to cable operators and programmers by must-carry. With respect to the second alternative—"genuinely non-discriminatory entitlements to carriage at regulated rates", J.S. 96a—Judge Williams posited that, as with other regulated industries, Congress could correct a perceived market "distortion" by regulating rates for access such that broadcasters could compete "on equal terms" with all other programmers. J.S. 98a-100a. He also observed that "[i]f carriage generates for broadcasters the enormous incremental revenues that defendants claim, it is especially odd to find them disparaging the idea that they should pay any of the costs of access to this bonanza". J.S. 100a.[7]

---

[6] Judge Williams also noted that this objection was contrary to the FCC's position when defending the *Century* rules. J.S. 103a-104a n.28 ("cable subscribers [would] become accustomed to using off-the-air reception on an equal basis with cable service" after a transitional period) (citations omitted).

[7] Judge Sporkin dismissed Time Warner's takings claim, stating that Time Warner could reassert the claim before "the appropriate forum". J.S. 28a.

Judge Jackson believed a trial was necessary to resolve various fact issues. J.S. 33a. He stated, however, that "[w]ere I to follow my own predisposition as a minority of one I would nevertheless prevail by stalemate, which should not be. Thus, obliged to choose between two forcefully argued but contradictory analyses", he decided to cast his vote with Judge Sporkin, even though he agreed with Judge Williams regarding the nature of the governmental interest at stake—preservation of the local broadcasting system. *Id.*

**Summary Of The Argument**

The central question directed by this Court to the district court—"whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry"—must be answered with a definitive "no". *Turner*, 114 S. Ct. at 2470. The undisputed record below establishes that at the time must-carry was enacted (1) the local broadcasting system was in excellent financial condition and had experienced impressive growth in the absence of must-carry; and (2) cable operators voluntarily carried virtually all broadcast stations that had any measurable viewership. Moreover, post enactment, most broadcast stations actually demanded compensation from cable operators for the right to carry the stations' programming rather than exercise their must-carry rights. Faced with that indisputable evidence, Defendants and their own experts simply conceded below that there was no threat to the well-being of the free, local broadcasting system. Thus, the Government failed to show what this Court had asked it to prove and must-carry must be struck down under intermediate First Amendment scrutiny.

Prior to the remand proceeding, which demonstrated that there was no threat to the broadcasting system, Defendants agreed that the interest purportedly served by must-carry was the protection of the broadcasting system and that they bore the burden of showing that the system was at risk. In 1992,



Defendants argued that absent must-carry, cable operators would exercise their editorial discretion in such a way as to present a serious threat to the viability of the local broadcasting system.[8] In 1994, the Government argued to this Court that the substantial governmental interest underlying must-carry was the "preserv[ation] [of] the local broadcast industry". Brief for the Fed. Appellees at 39 (Dec. 7, 1993) ("Gov't App. Br.").[9] The Government told this Court that Congress intended to prevent the "devastation [that would be] wrought upon the broadcast industry" without must-carry. Transcript of Oral Argument at 40, in *Turner* (answers of Solicitor General) (Jan. 12, 1994).

Rather than adhering to their prior representations and this Court's remand instructions, Defendants did an abrupt about-face: They disclaimed any obligation on remand to show that the broadcasting system is in jeopardy.[10] Instead, Defendants

---

[8] *See, e.g.*, National Association of Broadcasting ("NAB") Corrected Mem. in Opp. to Pl. Mo. for Pre. Inj. at 14 (Nov. 24, 1992) ("risks of anticompetitive harm are so substantial, Congress concluded, that 'the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized,' absent remedial legislation") (citing congressional findings); NAB Opp. to Pl. Mo. for a T.R.O. at 10-11 (Dec. 2, 1992) (stating that cable's carriage behavior "placed broadcasting's future in jeopardy" and "could deprive the 40% of American households without cable of the opportunity to receive video programming *at all*") (emphasis added).

[9] *See also* Gov't App. Br. at 40 (must-carry protects "noncable households from loss of regular television broadcasting service"); *id.* at 40 n.27 ("government interest in preserving local broadcasting").

[10] *See, e.g.*, Corrected Mem. of the Gov. in Opp. to Pl. Mo. for S.J. at 7 (June 21, 1995) ("Gov't Opp. Br.") ("Congress did not contemplate, as plaintiffs contend, that the entire broadcast industry is in jeopardy"); Opp. of NAB and INTV to Pl. Mo. for S.J. at 18 (June 16, 1995) ("NAB Opp. Br.") ("Must-carry was not enacted to prevent the disappearance of free local broadcast television").

argued that must-carry is intended to promote the widest possible dissemination of speech by improving the economic fortunes of the few marginal stations that arguably need the protections provided by forced carriage (mainly UHF stations with no viewership).[11] This Court should reject Defendants' bald attempt to evade their burden under First Amendment scrutiny. Defendants cannot satisfy any level of First Amendment scrutiny by inventing some hypothetical governmental interest that they stand a better chance of proving. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Simon & Schuster, Inc. v. Members of the New York State Criminal Victims Bd.*, 502 U.S. 105, 120 (1991). Contrary to Defendants' assertions, this Court did not find the interest at stake to be naked favoritism for a little watched, eleventh or twelfth broadcast station in a community (which has its own over-the-air means of reaching an audience) at the expense of a cable programmer (which lacks an over-the-air outlet).

After four years of litigation and three judicial decisions, there should be no dispute regarding the governmental interest at stake. Congress claimed to have enacted must-carry to protect the local broadcast*ing* system for the benefit of the 40% of Americans who cannot afford or do not want cable television, not to protect marginal broadcast*ers* who do not attract viewership because of their poor programming and related lack of adequate financial resources. Accordingly, Judge Sporkin erred as a matter of law in crediting the new interest manufactured by Defendants below.

In any event, the interest now put forth by Defendants, unlike the interest recognized by this Court, is fundamentally illegitimate under the First Amendment and properly subject to review under strict scrutiny. This new interest is naked

---

[11] *See, e.g.*, NAB Opp. Br. at 22 ("must-carry will principally protect those broadcast stations most at risk under a system of pure private ordering"); Noll Dep. at 17-18, 60 (J.A. 446-47, 450).



protectionism—"the more the better" interest in improving the lot (and thus enhancing the voice) of one class of speakers at the expense of another. This Congress cannot do. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). By abandoning any pretense that the local broadcasting system is in genuine jeopardy, Defendants have also abandoned the "content-neutral", intermediate scrutiny underpinnings of must-carry—a position that would require the application of strict scrutiny under the First Amendment, which must-carry certainly could not survive.

The must-carry provisions are also constitutionally infirm because they are overbroad. They grant each broadcast station, including financially strong ones, the right to force its way onto cable systems. The record establishes that a substantial number of stations (including powerful and highly profitable network affiliates) have exercised must-carry rights, many to expand greatly the reach of their over-the-air television signal. Likewise, the must-carry provisions apply irrespective of whether a cable system has engaged in anticompetitive behavior or whether a broadcast station has ever been the object of anticompetitive conduct with respect to cable carriage. There simply is no "fit" between the must-carry provisions and the interests that have been asserted.

The undisputed facts below more than substantiate that must-carry imposes a substantial burden on the First Amendment rights of both cable operators and programmers. The number of programming sources seeking carriage far outstrips the number of available channels on virtually every cable system in the Nation. Very few cable operators have unused channel capacity, and when such capacity exists, it is filled quickly. Thus, cable operators must choose from among a wide variety of programming sources to fill their finite channel capacity and create the most desirable package of programming for their viewers. The must-carry provisions directly override those editorial choices and foreclose limited

channel capacity that could otherwise go to cable programmers. This governmental restriction on cable operators' and programmers' speech is true First Amendment injury. As such, it raises grave constitutional concerns, unlike the economic harm allegedly suffered by a few marginal broadcasters.

Faced with overwhelming evidence that must-carry neither furthers a substantial governmental interest nor is narrowly tailored to advance any such interest, Defendants argued below for undue deference to Congress, claiming that as long as Congress can find some selection of facts—even anecdotal, unreliable facts—to support its "findings", then an Article III court need look no further. That is at best "rational basis review"—a standard this Court has already unanimously rejected. *Turner*, 114 S. Ct. at 2456-58. This Court has plainly held that Federal courts must exercise "independent judgment" of the facts and be the ultimate arbiter of constitutionality itself. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978). Thus, the facts relied upon by Judge Sporkin below—unfounded speculation and conjecture by an FCC Commissioner, industry insiders, and a "slew of notable experts"—cannot justify the burden placed by must-carry on the First Amendment activities of cable operators and programmers.

## Argument

### I. MUST-CARRY DOES NOT FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST BECAUSE THE LOCAL BROADCASTING SYSTEM IS NOT IN GENUINE JEOPARDY.

#### A. The Local Broadcasting System Thrived In The Absence Of Must-Carry.

The economic health of the local broadcasting system is not in genuine jeopardy or in need of the protections afforded



by must-carry. As Defendants' lead expert, Dr. Roger Noll, testified: "I do not believe that 'must-carry' in the current environment is properly characterized as something that has to do with the viability of the entire industry". Noll Dep. at 156 (J.A. 453-54). That conclusion was corroborated by Defendants' other expert Dr. Harry Shooshan: "So do you need must-carry to support the health of the broadcasting industry as [a] whole today, no". Shooshan Dep. at 79 (J.A. 478).[12] Although those concessions are dispositive, the broadcast industry's performance during the seven-year period in which there were no must-carry requirements—following the District of Columbia Court of Appeals' decision in *Quincy*, 768 F.2d 1434, striking down the FCC's must-carry rules (July 19, 1985) until the date Congress passed the 1992 Cable Act (October 5, 1992)—demonstrates that the broadcasting system is not threatened by the carriage decisions of cable operators. Rather than being jeopardized, broadcasting *thrived* in the absence of must-carry. The undisputed facts lead to only one conclusion: The problem Congress believed it was addressing with must-carry did not in fact exist.

**1. Significant entry occurred.** It is uncontested that the number of television stations in operation markedly increased between 1985 and 1992. During that period, the total number of television stations in operation increased from 1,235 to 1,506 stations—an increase of 22%. Besen Decl., Exh. 5 (compiling data from *TV & Cable Factbook* (1995))

---

[12] *See also* Noll Dep. at 79 (J.A. 453) ("I do not believe that over-the-air broadcasting is going to disappear because of the absence of 'must-carry'"); Goodman Dep. at 129-30 (J.A. 340) (corporate representative of the NAB testifying that "[a]s of 1989 the TV industry as a whole looking at gross numbers was not in an economic decline", and "broadcast television is still the dominant form of TV"—"by a significant margin").

(J.A. 852-53).[13] The total number of commercial stations increased from 919 to 1,138 stations (an increase of nearly 24%), and the total number of noncommercial stations increased from 316 stations to 368 stations (an increase of nearly 16.5%). *Id.* The total number of VHF commercial and noncommercial stations increased from 643 stations to 679 stations, and the total number of UHF commercial and noncommercial stations increased from 592 stations to 827 stations. *Id.* Even the number of UHF independent stations—the only stations that, according to Defendants, face true peril without must-carry (*see infra* at p. 26)—grew more during the non-must-carry period than any other subcategory of stations: from 246 to 409 stations. *Id.* Attach. D, Exh. D-2 (compiling data from *TV & Cable Factbook* (1995)) (J.A. 929).[14]

---

[13] Over the period 1981 to 1991, the broadcast industry witnessed a 39% expansion of its total number of stations. Defendants claim that despite these increases, the broadcast industry is still in "serious economic jeopardy" because the *rate* of increase in the number of broadcasters slowed during this period. As Judge Williams recognized, "the decline in growth rate is so modest, and persisting growth so robust, there can be no real claim that the numbers prefigure an eventual leveling off of the actual number of stations . . . much less a decline". J.S. 58a-59a. Defendants also have no answer for the fact that throughout the 1970s, with must-carry in force, there were almost identical rates of increase for broadcasters. *See* J.S. 58a, Graph #4.

[14] Not one of the Nation's approximately 200 television ADIs had fewer commercial broadcast television stations available in 1992 than in 1981. *Id.* Exh. 11 (J.A. 861-69). Only 5 of the Nation's ADIs had fewer commercial broadcast television stations available in 1992 than in 1987; and only 2 ADIs had fewer non-commercial television stations. In all but one of those seven instances, the decrease consisted of only one station leaving the air. Moreover, in those seven markets, there were, on average, 6.7 broadcast stations remaining after the decrease. *Id.* (J.A. 861-69, 871-79).

ADIs ("areas of dominant influence") are continuous, non-overlapping geographic areas that define, according to their creator, the Arbitron Company, television markets based on households' measurable television



Continuous market entry in terms of new broadcast television stations plainly reflects investor-held evaluations of a prosperous industry. *Id.* (J.A. 783).[15]

**2. Broadcast stations had strong financial performance.** The undisputed record below indicates that the viability of the average individual television station was not in any economic jeopardy absent must-carry requirements. Based on the NAB's annual financial survey of commercial television stations, the average television station in every category analyzed by the NAB was profitable in 1992—indeed, highly so. NAB, *The Television Industry: 1994 Market-by-Market Review* (J.A. 275-80).[16] Although the exact margin varies depending on the size of the ADI grouping, the cash flow margin in 1992 for the average VHF affiliate ranged between 31.8% and 40.6%, *id.* App. B at 1 (J.A. 277),

---

viewing patterns. *See* All Parties' Joint Statement of Undisputed Facts ¶¶ 38-45 (May 26, 1995) ("Stipulated Facts"). In the 1992 Cable Act, Congress incorporated the "ADI" into the eligibility criteria of the must-carry provisions. *See* 47 U.S.C. § 534(h)(1).

[15] Defendants' expert Mr. Tom Meek examined the data by parsing it on a quarterly basis from 1985-1992 (representing 28 quarterly periods). He could find only one quarter during that seven-year period (the first quarter of 1990) in which there was a decrease in the total number of stations on the air—the decrease being an admittedly "*de minimis*" total of two stations. *See* Meek Dep. at 394-95 (J.A. 444-45). Even then, Mr. Meek acknowledged that the entire year of 1990 witnessed 18 new commercial stations signing on-air. Meek Expert Rep. (J.A. 358). The Association of Independent Television Stations' corporate representative, Mr. Popham, could not identify any year in which he thought the number of operating stations had declined. *See* Popham Dep. at 84 (J.A. 346).

[16] The survey reports 1992 cash flow margins (the percentage by which revenues exceed operating costs) for average commercial stations grouped by station type (network affiliate or independent, VHF or UHF) and by the size of the station's ADI. Since the first must-carry elections were not made until the summer of 1993, 1992 cash flow margins represent the last full year prior to the imposition of forced carriage.

and the cash flow margin in that year for the average VHF independents ranged from 18.4% to 27.5%, *id.* App. B at 3 (J.A. 279). The financial results for UHF stations were similar. In 1992, the cash flow margin for the average UHF affiliate ranged from a low of 18.6% to 31.1%, *id.* App. B at 2 (J.A. 278), and the cash flow margin for the average UHF independent ranged from a low of 15.6% to over 28.2%, *id.* App. B. at 4 (J.A. 280). In 1991, Dr. Mark Fratrik, the NAB's Economic Research Director, had reported similar findings about the health of individual stations.[17]

**3. Broadcast television advertising revenues grew steadily.** Between 1985 and 1992, the aggregate figures for television advertising revenues reflect strong economic performance for the broadcast industry across the board. For example, broadcast advertising revenues on the three networks increased from just over $8.31 billion in 1985 to $9.46 billion in 1991. *TV & Cable Factbook* (1993) (J.A. 213). During the same period of time, the advertising typically sold by individual stations—national and local spot—was growing, and at rates even greater than network advertising growth. National broadcast spot advertising increased from $6 billion to $7.1 billion, and local spot broadcast advertising increased from $5.7 billion to $7.6 billion. *Id.* (J.A. 211). The broadcasting industry itself characterized these revenues as "healthy".[18] Moreover, Judge Williams charted the growth in

[17] NAB, *Economic Research Director Memorandum Re: Results from Television Financial Survey* (July 19, 1991) (J.A. 117-18) (1990 was a "growth year for television"; the average network (ABC, CBS or NBC) affiliate had $15.9 million in revenues and pretax profits of $3.6 million; and the average independent station had revenues *larger* than those experienced by network affiliates, totaling $16 million in 1990).

[18] NAB, *Advertising Revenues Per Television Household: A Market by Market Analysis* (1990) (J.A. 67) (concluding that for the period of 1985-1989, total television advertising increased 26.4% *per household* with or without cable television, national spot advertising increased 23.3%, and



advertising revenues for broadcast stations in constant dollars and found that broadcast's overall gain in gross advertising revenues from 1981 to 1991 was $3.7 billion. J.S. 50a-51a.[19]

**4. A major new network emerged.** During the time period that Defendants contend the broadcasting system was in peril because of the absence of must-carry, a fourth major network was born—the Fox Broadcasting System ("Fox"). From its debut in 1986, Fox enjoyed meteoric growth. It drew 96 stations nationwide to its affiliate ranks in its first year of operation. Within a few years of launch, Fox had achieved cable carriage on 92% of the Nation's cable systems. Salhaney Dep., Exh. 18 (J.A. 513). By 1992, there were 140 Fox affiliates—nearly entirely comprised of stations formerly from the independent ranks—which provided Fox with over-the-air coverage of more than 95% of the Nation's television households. *Id.* Exh. 30 (J.A. 514). And Fox affiliates overwhelmingly elected retransmission consent in 1993 (negotiating a carriage agreement with the operator as opposed to forced carriage under must-carry). NAB, *TV Today* (July 19, 1993) (J.A. 248-49). The rise of a major broadcasting network in a period without must-carry demonstrates the absence of any relationship between forced carriage and the health of the broadcasting industry as a whole.

**5. Broadcast stations elect retransmission consent in large numbers.** The extent to which broadcast stations have exercised their rights under Section 6 of the Act, the retransmission consent provisions, demonstrates their overall health. Those provisions prohibit cable operators from carrying the signals of commercial broadcast stations without

local advertising increased 36.1%).

[19] Judge Williams also found that trends in cable advertising suggest that must-carry has little influence on the competition for advertising between broadcast and cable. J.S. 52a-54a.

their consent. 47 U.S.C. § 325(b). A broadcast station must make an election between must-carry rights and retransmission consent (*i.e.*, a retransmission consent election foregoes all must-carry rights). *Id.* § 325(b)(4). In 1993, more than 80% of all commercial broadcast stations (including 90% of stations affiliated with one of the four networks) elected "retransmission consent", instead of the must-carry provisions, with respect to at least one cable system and thereby forced cable operators to negotiate terms for the right to carry a broadcast signal. Stipulated Facts ¶¶ 120-21.[20]

### B. Cable Operators Voluntarily Carry The Vast Majority Of Broadcast Stations.

Contrary to Defendants' claim that huge numbers of broadcast stations are at risk, the undisputed record establishes that cable operators voluntarily carry virtually all broadcast stations with any measurable viewership. Defendants concede that, on average, cable operators voluntarily carry the first 6 to 7 stations in each ADI. *See* Defendants' Fact Response ¶ 7; Gov't Opp. Br. at 16.[21] The evidence also demonstrates that:

---

[20] It was undisputed that of those commercial stations alleged to be victims of adverse carriage actions, over 20% elected retransmission consent on cable systems serving most of the cable households in their ADIs. TWE Broadcast Station Rebuttal (June 16, 1995) (J.A. 2275).

[21] A Federal Trade Commission ("FTC") analysis of Defendants' pre-1992 data reveals that, on average, cable operators carried 8 out of 9 available broadcast stations, that "most cable systems voluntarily carry all of their former must-carry stations", and that "[m]ost episodes of non-carriage appear to have involved distantly-located (and duplicated) network signals and relatively low-rated commercial independent stations". *Reply Comments of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission*, MM Docket No. 90-4 (Nov. 26, 1991) ("FTC Staff Study") (J.A. 160-61, 168). The FTC Staff Study relied on the data from the 1988 FCC survey, that was relied upon by Defendants below and found inconclusive by this Court in 1994. *See Cable System Broadcast Signal Carriage Survey Report*, FCC Staff Report, Policy & Rules Division of the Mass Media Bureau (Sept. 1, 1988) ("1988 FCC Carriage Survey") (J.A. 36); 114 S. Ct. at 2471 (deeming questionable the evidentiary weight to be given to the survey). The FCC's data also revealed that 70% of stations had *no* instances of non-carriage by *any* cable system and 80% of cable systems had *no* instances of non-carriage of any station. FTC Staff Study (J.A. 167-69).



- 90% of all local stations with any reportable ratings in non-cable households are carried by cable systems.
- The average cable subscriber receives local broadcast stations accounting for about 98% of all viewership of local stations by non-cable households.
- A significant percentage of local stations that had no reportable viewership also were carried voluntarily. Besen Decl. (J.A. 778-79, 797-811).

Those facts alone definitively establish that the millions of Americans who do not subscribe to cable will not lose the benefits of a free-over-the air local broadcasting system in the absence of must-carry.[22]

Defendants' own evidence also demonstrates that, when a broadcast station cannot obtain carriage on cable systems within an ADI, two facts tend to exist: (1) the broadcast station is in a community that is served by an above-average number of broadcast stations; and (2) the broadcast station has particularly low viewership ratings in its local community.[23]

---

[22] Moreover, when Defendants offer figures such as "___ drops", it must be remembered that usually each drop involves one cable system dropping the station among an average of 53 systems within the ADI. Stipulated Facts ¶¶ 39-45, 136; Defendants' Joint Response to Plaintiffs' Joint Statement of Undisputed Facts Established by the Record ¶ 16 (Aug. 22, 1995) ("Defendants' Fact Response").

[23] Dertouzos Reb. Decl. at Table A-3 (J.A. 1905) (finding that in communities with less than 3 stations, 100% are carried; less than 4, 94% are carried; less than 5, 90% are carried; less than 7, 86% are carried; 8 to 11, 79% are carried; 12 or greater, 72% are carried); Noll Dep. at 60-63 (J.A. 450-52) (absence of must-carry would lead to dropping of stations

Thus, communities with a relatively small number of broadcast stations are not benefited by must-carry because cable operators within those communities carry all of the available broadcast stations. Likewise, in communities where a broadcast station is more at risk of being dropped by a cable operator (because there are a plethora of stations), cable operators in those communities already carry a large number of broadcast stations.[24]

### C. The Few Broadcast Stations Denied Carriage In The Absence Of Must-Carry Did Not Deteriorate To A Substantial Degree.

If a substantial number of stations had been dropped or denied carriage in the absence of must-carry and those stations had incurred serious injury, the aggregate trends in the industry would reflect the problem. As shown by the foregoing, they do not. Even those few stations that might have some difficulty obtaining carriage without must-carry—which Defendants identified as the least watched independent UHF broadcast stations (*see infra* at p. 26)—have not significantly deteriorated because of the carriage decisions of cable operators. The record shows that the number of independent UHF stations during the period without must-

---

with "lowest audience ratings"; carriage of such stations does not attract subscribers); McLaughlin Aff. (J.A. 2183-84) (citing Defendants' evidence showing stations most likely to benefit from must-carry were niche stations—home shopping, foreign language or religious stations—with minimal viewership); FTC Staff Study (J.A. 172-74) (finding stations identified in 1988 FCC Carriage Survey had low viewership ratings).

[24] As Judge Williams found:

> "It is only those areas in which the airwaves are relatively busy—areas in which concern about the health of local broadcasting would be at a minimum—that cable carriage becomes an issue. Where stations are few and the loss of any one theoretically significant, the defendants' figures indicate that cable carries the signals voluntarily." J.S. 72a.



carry grew from 246 to 409 and those stations experienced healthy profit margins. *See supra* at pp. 14-16. Such growth is wholly inconsistent with an industry in genuine economic jeopardy.[25]

Although conceding that the number of UHF stations grew in the absence of must-carry, Defendants contended that those stations would have enjoyed even *greater* growth with must-carry because, as their lead expert posited, cable television allows UHF stations to expand their market by overcoming their natural "handicap"—namely, their inferior broadcast signal.[26] To the extent that cable television enables most UHF stations to overcome their own natural limitations, that does not mean that those stations are "weakened" by cable operators when they are denied carriage. Rather, they are in the very position they occupy in a world without cable television. As the record shows, UHF stations enjoy healthy growth even when left to compete without the subsidy provided by forced cable carriage.[27]

---

[25] Judge Sporkin deemed it "obvious" that any broadcast station "denied access to *the* cable system in its local market would suffer financial harm and possible ruin". J.S. 15a (emphasis added). Not only was there no evidence to support that observation, but Judge Sporkin ignored undisputed evidence showing that a broadcast station on average has approximately 53 cable systems within its ADI. *See supra* at p. 19 n.22.

[26] *See* Noll Decl. ¶ 40 (J.A. 1027-28) ("When viewers subscribed to cable, the UHF stations were received with greater clarity, and sometimes on a valued lower channel number."); Dertouzos Decl. ¶ 31 (J.A. 972) (describing UHF handicap).

[27] Moreover, out of the roughly 300 stations identified by Defendants as suffering harm from adverse carriage actions, only fifteen actually left the air. But even for these, causation is suspect at best. One of these left the air because it was hit by a tornado; another because of transmitter damage. *See* TWE Broadcast Station Rebuttal (J.A. 2384, 2401). Three others went off the air, respectively, because of an FCC order; because the station was sold and came back under a new name; and because the station was never licensed. *Id.* (J.A. 2297, 2355, 2420-21).

### D. The Local Broadcasting System Is Not At Risk Of Some Future Harm.

Confronted with the undisputed evidence that the local broadcasting system has thrived in the absence of must-carry, Defendants asserted below that Congress made a "predictive judgment" that the local broadcasting system would suffer economic peril in the future from possible actions of cable operators. The First Amendment rights of cable operators and programmers cannot be abridged merely on the basis of speculation about the future conduct of cable operators. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1017 (1995) (citation omitted) ("a 'reasonable' burden on expression requires justification far stronger than mere speculation about serious harms"); *Turner*, 114 S. Ct. at 2470 (holding that the "recited harms" must be "real" not merely "conjectural"). In other words, Congress cannot restrict speech based on an assumption about a future problem that is not grounded upon some concrete evidence indicating that the perceived problem will in fact become real. The undisputed evidence regarding the health of the broadcasting industry in the absence of must-carry definitively disproves Congress' "predictive judgment" that cable operators have certain inherent incentives to harm the local broadcasting system.

Even if the Court looks beyond that undisputed evidence, Congress' prediction of impending doom for the broadcasting industry is based on assumptions having absolutely no grounding in fact. Congress speculated, for instance, that because cable operators compete with broadcasters in selling advertising time, they have an incentive to drop broadcasters, and will act on that incentive with such frequency that the local broadcasting system is in genuine jeopardy. 47 U.S.C. § 521, notes 2(a)(15), (16). The record convincingly demonstrates that such a prediction was baseless.

*First*, the record below is undisputed that (1) revenues



from subscribers, not advertisers, are the overwhelming source of revenue in the cable business—indeed, by about a 25:1 margin, Paul Kagan Assocs., *Cable TV Investor* (June 23, 1992) (J.A. 196), *Kagan Media Index* (Feb. 24, 1995) (J.A. 318); and (2) local broadcast programming accounts for approximately two-thirds of total cable viewing hours, S. Rep. No. 92, 102d Cong., 1st. Sess. 35 (1991); McLaughlin Aff. ¶ 22 (J.A. 2182); Clouston Supp. Aff. ¶ 2 (J.A. 1785-86).[28] If cable operators dropped broadcast stations with any significant viewership, they would risk losing subscribers and thus subscriber revenues. Haring Decl. ¶ 37 (J.A. 1106).[29] It is not logical to suggest cable operators will risk their overwhelming source of revenues—subscribership—for the speculative possibility that their modest advertising revenues

---

[28] *See* Besen Decl. (J.A. 793) (advertising revenues "account for about 4% of total cable system revenues") (citing Paul Kagan, *The Cable TV Financial Data Book* 6 (1994) (1993 cable advertising revenues were $984 millon) and Television Bureau of Advertising, *Trends in Television* 11 (1994) (1993 broadcast station advertising revenues were $16.2 billion)). Defendants' lead expert agrees that "advertising sold by both cable networks and cable systems still accounts for only a few percent of total television advertising". Noll Decl. ¶ 14 (J.A. 1006). Even by 2002, a leading industry analyst estimates that advertising revenues will not exceed 6% of total cable revenues. Paul Kagan Assocs., *Cable TV Advertising* (June 22, 1993) (J.A. 235).

[29] The FTC Staff Study, analyzing the data compiled in the 1988 FCC Carriage Survey, concluded that the drops which did occur were not related to any incentives for advertising dollars. FTC Staff Study (J.A. 179-80) ("First, most systems did not deny carriage to any of their former must-carry stations, indicating either that cable market power in advertising market is absent, or that the likely decrease in audience size and profits from carriage denial is large relative to any anticompetitive gains in advertising revenue. Second, when carriage denial did occur, it often involved stations that either did not sell advertising or that accounted for only a trivial share of the total television advertising market.").

will increase in a significant way.[30]

*Second*, Defendants' evidence indicates that the broadcasters actually threatened with being dropped in the absence of must-carry are the *least-watched* stations, precisely those that are most unattractive to advertisers.[31] If cable operators truly had an overriding incentive to win advertising dollars by dropping broadcasters, then they would drop stations with significant viewership (*i.e.*, the network affiliates). Defendants concede, however, that virtually all such significant broadcast competitors of cable are voluntarily carried by cable operators and thus do not need must-carry. *See infra* at p. 26. Defendants' theory also makes no sense with respect to noncommercial stations, which do not sell any advertising.

*Third*, it is undisputed that broadcast television has inherent competitive advantages in attracting advertising that will not be altered in the foreseeable future. Stipulated Facts ¶¶ 100-05, 107.[32] Also, significant technical difficulties and

---

[30] The undisputed testimony in the record also establishes that cable operators pay scant attention to potential advertising revenues in making programming line-up decisions. *See, e.g.*, Dressler Aff. ¶ 12 (J.A. 1088); Zipin Aff. ¶ 7 (J.A. 1172-73).

[31] *See, e.g.*, Noll Dep. at 17-18 (J.A. 446-47); *id.* at 60 (J.A. 450) (absence of must-carry would lead to dropping of stations of "relatively low audience rating"); *id.* at 221-22 (J.A. 458) (the less popular a station the more important is must-carry to its welfare); *id.* at 307-08 (cable systems will not drop the "more popular or popular over-the-air television stations"); FTC Staff Study (J.A. 160-61) ("Most episodes of non-carriage appear to have involved distantly-located (and duplicated) network signals and relatively low-rated commercial independent stations. Such actions would be consistent with competitively-determined carriage decisions, and would suggest generally that non-carriage decisions have not been motivated by anticompetitive considerations.").

[32] *See* NAB, *Television in Transition* (Jan. 30, 1990) (J.A. 82-83) ("[b]roadcast TV is the only means of rapidly delivering large blocs of



expenses limit cable operators' ability to sell advertising on all but the most popular cable channels. Zipin Aff. ¶¶ 10-13 (J.A. 1173-74); *see also* Kinley Aff. ¶¶ 11-13 (J.A. 1131-32) (smaller operators do not sell advertising because of expense).

*Fourth*, Time Warner pays more than twice as much in carriage fees to cable programming networks than it takes in from advertising insertions on those networks. Zipin Aff. ¶ 8 (J.A. 1173). Accordingly, cable operators have a substantial disincentive to carry cable programming services over broadcast television stations that provide similar programming. *Id.*

*Finally*, even if a cable operator were inclined to drop a broadcast station to capture that station's advertising revenues, it could not easily do so. Defendants simply assume, for instance, that advertisers on the dropped broadcast stations will now advertise on cable channels for which the cable operator sells advertising, as opposed to another broadcast station or similar competitor. *See* Zipin Aff. ¶ 4 (J.A. 1172). Defendants offer nothing to support that dubious assumption. In fact, Defendants' evidence on remand indicates that, when a broadcast station loses viewers, other broadcast stations—not cable operators—are the beneficiaries.[33]

---

consumers who can be reached in a variety of program environments suited to achieving maximum involvement and impact"); Zipin Aff. ¶ 18 (J.A. 1175) ("TV stations reach the audience in their whole [ADI], while cable systems reach only a limited number of subscribers").

[33] Noll Dep. at 78-79 (J.A. 453) ("[i]t seems to me that if there's three UHF independents in a city and one is dropped and two aren't, the two that aren't dropped benefit").

## II. MUST-CARRY CANNOT BE UPHELD ON THE GROUND THAT IT PROMOTES THE SPEECH OF A SMALL NUMBER OF MARGINAL BROADCASTERS.

### A. The Defendants Improperly Reformulated Their Burden Below.

Faced with the overwhelming evidence developed on remand that the broadcasting system is thriving and that there is no future threat to it, Defendants attempted to shrink the governmental interest purportedly advanced by must-carry, arguing now that must-carry is simply intended to protect certain weak, financially marginal, independent UHF stations with minimal viewership.[34] According to Defendants, must-carry is intended to ensure cable carriage of every such broadcaster, thereby fostering a diverse mix of speech.[35]

Defendants have retreated to an indefensible position.

---

[34] *See* Noll Dep. at 18 (J.A. 446) ("My expectation would be on the order of 25, 30 percent of the stations that are UHF independents would be significantly affected by being dropped"); *id.* at 183 (J.A. 458) ("[i]t's the 25 percent of UHF independent channels"); Defendants' Fact Response ¶ 66 ("[I]t is not the health of the average independent station that is at issue here"); *id.* ¶ 65 (network affiliates "are largely irrelevant to an evaluation of must-carry"); *id.* ¶ 73 ("a general statistic referring to the entire industry is irrelevant, given the marginal financial condition of UHF independents (the stations most often denied carriage absent must-carry)").

[35] Defendants' Fact Response ¶ 11 ("Whether there were 'at least nine *other* operating broadcast stations' in the ADI in which these unconsented adverse carriage actions occurred is irrelevant. The must-carry rules promote, *inter alia*, the dissemination of information from a multiplicity of sources."); Gov't Opp. Br. at 6, 13 (must-carry protects "financially weak stations" to ensure "the *widest possible* dissemination of speech from diverse and antagonistic sources") (emphasis in original); Public Broadcaster Opp. Mem. to Pl. Mo. for S.J. at 24 (June 16, 1995) (Congress aimed to provide "universal access" to all public stations).



Defendants cannot satisfy their burden under heightened scrutiny by articulating an interest that was not advanced by Congress, but rather manufactured during litigation. *See Edenfield*, 507 U.S. at 768 (holding that a party cannot satisfy First Amendment scrutiny "if it appears that the stated interests are not the actual interests served by the restriction").[36] That principle is particularly applicable where (as here) a party attempts to offer the effects of a statute as the governmental interest at stake. *See Simon & Schuster*, 502 U.S. at 120 (disapproving attempt to "take[] the effect of the statute and posit[] that effect as the State's interest").[37] Indeed, Defendants' position is quite ironic given that they have defended this legislation on the grounds that it contains detailed findings and purposes, none of which mention Defendants' newfound interest. Defendants simply cannot make up a governmental interest, but rather must defend must-carry based upon Congress' intended interest.

Congress' stated justification for the must-carry provisions was that the economic health of the local broadcast*ing* system was in jeopardy, not that a subset of individual broadcast*ers* required forced carriage to improve their profitability.[38]

---

[36] *See Turner*, 114 S. Ct. at 2470 (incorporating the standard from *Edenfield* for the first prong of scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968)); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 728, 730 (1982).

[37] By equating the effects of must-carry with its purpose, Defendants not only hope to evade their burden under the "substantial interest" prong of First Amendment scrutiny, but also seek to make must-carry "appear" self-evidently narrowly tailored. *Simon & Schuster*, 502 U.S. at 120 (holding such an approach could "sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored").

[38] In striking down the previous must-carry rules under the First Amendment, the *Quincy* court explicitly noted the Government's asserted interest: "the distinction is critical, the rules seek to protect local broadcast*ing* and not local broadcast*ers*". *Quincy*, 768 F.2d at 1460

Congress expressly predicted that, in the absence of must-carry, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized", 47 U.S.C. § 521, note 2(a)(16), "especially for viewers who are unable to afford other means of receiving programming", *id.* § 521, note 2(a)(12). Likewise, the Act states that must-carry "is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services". 47 U.S.C. § 521, note 2(a)(9). The meaning of Section 307(b) has been clarified by Congress and this Court: "The Commission has concluded, and Congress has agreed, that these [Section 307(b)] obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size (will) have at least one television station as an outlet for local self-expression'". *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-74 (1968) (citation omitted).[39]

Congress' intent could not be more clear: It justified must-carry as vital to the preservation of the allocation system created by Congress and administered by the FCC for the benefit of non-cable viewers—the goal of which is to ensure that every community has access to a *minimum* amount of television broadcast service. That purpose is consistent with the longstanding policy of the Communications Act to encourage competition, not to protect individual broadcasters

---

(citations omitted) (emphasis in original).

[39] *See also Turner*, 114 S. Ct. at 2469 ("Congress designed this system of allocation to afford each community of appreciable size *an over-the-air source* of information and *an outlet* for exchange on matters of local concern") (emphasis added).



from competition.[40] Congress did not enact must-carry to force a cable operator to provide its viewers with every available broadcast station in an ADI, making the eleventh or twelfth station just as important as the fourth.[41]

The legislative history of the 1992 Cable Act also reveals that the purpose of must-carry is nothing less than the preservation of the *system* of broadcast television, not individual stations. The Senate Report could not be more clear. *See* S. Rep. at 36 (purpose is preventing "our system of free broadcasting" from being "replaced by a system which requires consumers to pay for television service"); *id.* at 42 ("absent legislative action, the free local off-air broadcast system is endangered"); *id.* at 60 ("governmental interests at issue here involve the preservation of the system of local television broadcasting"). The House Report is to the same effect: "The governmental interests at issue here involve the

---

[40] *See* 47 U.S.C. § 521(6) (purpose of Act is to "promote competition"); *id.* § 521, note 2(b)(2) (intent to "rely on the market place, to the maximum extent feasible"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("it is not the purpose of the Act to protect a licensee against competition but to protect the public"; a broadcaster must "survive or succumb according to his ability to make his programs attractive to the public"); *In Re Appl. of Univision Holdings, Inc.*, 7 F.C.C. Rcd. 6672, 6680 (1992) (stating that "it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public"). Indeed, Congress' stated interest is analogous to the well-established principle that the antitrust laws do not protect competitors, but rather competition. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2588-89 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[41] *See* S. Rep. at 60 ("Whether the access of cable subscribers to any particular viewpoint or the preservation of any individual television station might be placed at risk in the absence of signal carriage regulations is not the issue").

preservation of the *system* of local television broadcast*ing* and access to local television stations' programming for subscribers to cable television and the substantial minority of consumers who cannot or do not subscribe to cable television". H.R. Rep. No. 628, 102d Cong., 2d Sess. 65 (1992) (emphasis added).[42]

This Court stated, based upon its "review of the Act and its various findings", that "Congress' *overriding objective* in enacting must-carry was . . . to preserve access to free television programming for the 40 percent of Americans without cable". 114 S. Ct. at 2461 (emphasis added). The Court expressly noted that Defendants were in agreement: "In defending the factual necessity for must-carry, the Government relies in principal part on Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be 'seriously jeopardized'". *Id.* at 2470 (citing 47 U.S.C. § 521, note 2(a)(16)). Throughout its opinion, the Court used different formulations of this same interest.[43] Thus, the Court

---

[42] Congress also stated that its interest in diverse speech was not an end in itself, but rather was advanced by preserving the local broadcasting system:

> "The almost 40 percent of American television households which do not have cable service will, as a consequence, be deprived of local program service and the diverse voices that existing local television stations provide. They will either lose this diversity entirely or be forced to become cable subscribers, effectively losing the benefits of the system of free local broadcasting". S. Rep. at 59; H.R. Rep. at 64.

[43] *See, e.g.*, 114 S. Ct. at 2455 ("the economic viability of free local broadcast television . . . will be seriously jeopardized"); *id.* at 2461 ("Congress sought to avoid the elimination of broadcast television"); *id.* ("the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming"); *id.* at 2467 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television



remanded for a determination of "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry". *Id.*

Defendants' abnegation of any responsibility to meet that standard—indeed, their abnegation of their own formulation of the governmental interest at stake when previously before this Court (*see supra* at p. 9)—is extraordinary. Conceding that the burden must-carry imposes on the speech of others cannot be justified as necessary to preserve the benefits of the local broadcasting system for the millions of Americans who cannot afford or do not want cable television, Defendants now defend must-carry as a welfare scheme for those few individual broadcast stations not carried precisely because the marketplace for speech has deemed their programming less valuable than countless other alternatives, including cable programming and other broadcast stations. Defendants thus defend must-carry, as Judge Sporkin did, on a single protectionist interest: It serves the interest of assisting those marginal broadcasters that invoke its protections. This Court should reject this eleventh-hour reformulation of the interest at stake.

### B. Congress Cannot Favor Marginal Broadcasters Without Establishing A Compelling Interest In Such Favoritism, Which It Cannot.

Even if the Court considers Defendants' newly-invented interest, we submit that restricting the speech of all cable operators and programmers for the purpose of promoting the speech of a handful of marginal broadcast stations is "wholly foreign to the First Amendment". *Buckley*, 424 U.S. at 48-49. A unanimous Court in *Turner* held "that laws favoring some speakers over others demand strict scrutiny when the

---

industry is in economic peril").

legislature's speaker preference reflects a content preference". 114 S. Ct. at 2467. Under that principle, a law must be subject to strict First Amendment scrutiny where (as here) it seeks to create a diverse mix of speech by favoring a few undervalued speakers—the small number of marginal, financially weak broadcasters—at the expense of other speakers—the cable programmers who are displaced by broadcasters electing carriage under must-carry.[44]

In holding that the must-carry provisions are content-neutral, this Court, at Defendants' urging, placed particular emphasis on Congress' claimed interest in preserving the free over-the-air broadcasting system for the 40% of this Nation without cable television. The majority stressed that although the must-carry provisions posit the "widespread dissemination of information" as a value, 114 S. Ct. at 2470, they seek to achieve that value by preserving the viability of the broadcas*ting* system, not by favoring certain undervalued broadcas*ters* at the expense of other speakers. *Id.* at 2461; *see also Quincy*, 768 F.2d at 1460 (describing goal of protecting individual broadcasters through a must-carry regime as "fundamentally illegitimate"). By elevating one of the purported benefits of the local broadcasting system (the widespread dissemination of diverse speech) into an end in itself, Defendants now justify must-carry on content-based grounds. If Defendants' claimed interest is to be considered, the most exacting First Amendment scrutiny is triggered.

Defendants simply cannot explain why Congress has a compelling interest in forcing cable operators to carry little-

---

[44] *See also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2716-17 (1992) (Kennedy, J., concurring in part) (holding First Amendment ensures diverse speech by *forbidding* government action, not by authorizing government intervention in the market place of ideas); *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988) (same).



watched, marginal broadcasters at the expense of competing cable programmers without referring to the content of speech. For instance, the NAB argued in its motion to affirm that Congress enacted must-carry to "increase[] the likelihood" that noncable households will have access to "religious stations, foreign language stations, educational programming, and other services that serve special needs". NAB's Mo. to Aff. at 22 (Jan. 22, 1996). In the court below, Defendants argued that "[t]o promote a multiplicity of information sources for those Americans who do not subscribe to cable, Congress may protect broadcast stations with limited but perhaps specialized audiences". Defendants' Fact Response ¶ 28. Similarly, the Government argued that Congress could force cable operators to carry little watched broadcast stations at the expense of cable programmers because the "central principle underlying the must-carry rules" is that "'even the lowest rated stations . . . attract audiences that are as large or larger than most cable networks'". Gov't Opp. Br. at 43 (quoting Noll Reb. Decl. ¶ 11).[45] That "central principle" offered below—promoting the speech of those broadcasters the Government deems more worthy of an audience at the expense of cable programmers—is undeniably content-based.[46]

---

[45] *See also* Defendants' Fact Response ¶ 171 ("purpose of the must-carry requirements is to promote the quality of programming service that broadcasters can provide"); NAB Opp. Br. at 9 (citing legislative history from the House Report noting that the purpose of must-carry is to a promote "a broad array of views and programs" from sources "antagonistic" to cable operators).

[46] In effect, because over-the-air broadcast stations are already one of the beneficiaries of governmental approval of their speech through the license allocation and renewal procedures, must-carry conveys yet another affirmation of the value the government finds in their programming—one that is inherently content-based.

### C. Defendants' Newly Claimed Interest Does Not Address A Real Problem.

Defendants and Judge Sporkin failed to explain what problem Congress was purportedly redressing by enacting a law that discriminates against virtually every cable programmer and operator merely to give marginal broadcasters (often the eleventh or twelfth broadcast station in an ADI) a competitive advantage, particularly where the broadcaster (unlike the disfavored cable programmer) may broadcast its programming over-the-air. There clearly is no such "substantial" governmental interest. All Defendants have offered as a problem is conjecture that there is a lack of diversity. However, they never explain why cable subscribers in each community must have access to the maximum number of broadcast stations possible—a number that varies from ADI to ADI so that viewers in New York City have access to 21 stations while those in Kansas City, Missouri have only 9.

In any event, the record below indicates that diversity is not lacking in the video programming market. Cable operators exercise their editorial discretion to provide as diverse a package of speech as possible in order to attract as many viewers as possible. Ironically, the must-carry provisions actually reduce the diversity of speech available to the public by forcing cable operators to carry unwatched broadcasters at the expense of cable programmers. Congress certainly does not promote diversity when it gives a minority of marginal broadcasters a license to override every cable operator's editorial decisions.

## III. THE MUST-CARRY PROVISIONS ARE NOT NARROWLY TAILORED TO FIT ANY OF THE INTERESTS POSITED BY DEFENDANTS.

### A. The Must-Carry Provisions Are Overbroad.

The must-carry provisions also must be struck down because they are ill-tailored to advance either Defendants'



newly invented interest (improving the health of a small number of financially weak broadcasters) or Congress' stated interest (preserving the viability of the broadcasting system). Defendants conceded below that most broadcast stations, including network affiliates, do not need the protections purportedly provided by must-carry.[47] Yet, the must-carry provisions endow *every* local broadcast station with a right to mandatory carriage without regard to whether the viability of the particular station is at issue. Even the most financially healthy stations can—and do—elect carriage through must-carry. That fact makes must-carry grossly overbroad.

The undisputed record shows that network affiliates and other profitable broadcast stations are electing must-carry status in large numbers. An NAB survey establishes that the vast majority of network affiliates—77.9% of ABC affiliates, 79.4% of CBS affiliates, 74.5% of Fox affiliates, and 74.3% of NBC affiliates—have forced carriage on *at least* one cable system *within each of the over 200 ADIs in the Nation*. NAB, *1993 Cable System Election Survey* (J.A. 208). The same NAB survey also establishes that almost all independent commercial stations—94.7%—have made at least one must-carry election in each ADI they cover. *Id.*[48]

The data submitted by Defendants' expert Meek corroborate the NAB's survey. Meek's data indicate that, from

---

[47] Defendants' Fact Response ¶ 7 (without must-carry "cable operators carried 'most' broadcast television stations", including "network affiliates").

[48] Where a statute's effects are not consistent with Congress' stated objective, the statute cannot be considered narrowly tailored. *See, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995) ("the irrationality of this unique and puzzling regulatory framework" ensures that the labeling ban fails to achieve its purported end); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993) (invalidating ban on certain newsracks because City failed to meet its "burden to establish a 'reasonable fit' between" ends and means).

1993 to 1994, 115 ABC affiliates, 107 CBS affiliates and 108 NBC affiliates were added to cable systems within their ADIs under must-carry. Meek Decl. ¶¶ 107-11, Exh. U. If Meek's data are cross-referenced with the financial data collected for the NAB from nearly every television station by Price Waterhouse, the data reveal that scores of highly profitable network affiliates—some with revenues in excess of $120 million—have utilized must-carry to force their way onto cable systems. *See* Revenue Charts, TWE Opp. Mem. to Def. Mo. for S.J. at 8-17 (June 16, 1995) ("TWE Opp. Br.") (J.A. 2235-41) (incorporating data from *1993 Price Waterhouse Television Financial Surveys*). Similarly, the record demonstrates that many independent commercial stations with strong profits have elected must-carry. *Id.* Thus, far from preserving the viability of the local broadcasting system (or even the weakest broadcasters), the must-carry provisions provide a financial windfall to already prosperous broadcasters.[49]

Moreover, must-carry sweeps within its mantle virtually all cable operators and dispenses benefits to virtually all broadcast stations without regard to whether a particular cable operator engaged in an anticompetitive act or whether a particular broadcast station was harmed by such an act. Such a blunderbuss approach is clearly overbroad. Indeed, the facts

[49] In many instances, financially healthy broadcast stations use must-carry to compel carriage on systems located beyond their signal's natural reach. For example, 107 CBS affiliates demanded must-carry on 217 cable systems; however, 188 of those 217 instances of forced carriage (87%) were on cable systems located further than 35 miles from the CBS affiliate. *Cf.* Meek. Decl. Exhibit U (all added commercial stations within an ADI) *with* Exhibit V (all such stations with 35 miles of a cable operator). *See also* Klein Aff. ¶¶ 27, 28 (J.A. 1143-44); Meek Dep. at 169 (J.A. 442-43) (broadcasters use microwave relay to reach other markets). Thus, the must-carry provisions allow profitable broadcast stations to compel carriage in distant locations not even conceivably material to their economic health.



below demonstrate that most cable systems do not engage in anticompetitive behavior, but rather carry the vast majority of broadcast stations and nearly all stations with any measurable viewership. *See supra* at pp. 18-20.

There plainly is no fit between must-carry and Defendants' conjectured concerns with vertical integration in the cable industry. Judge Williams recognized that must-carry imposes the same restrictions on both vertically integrated and non-vertically integrated cable operators, although the latter clearly do not have the incentives that Defendants hypothesize vertically integrated operators do. J.S. at 96a-98a. Thus, "for the class of non-vertically integrated cable operators, must-carry levels a playing field that was not tilted to begin with". J.S. 97a (Williams J., dissenting). Similarly, a cable operator who has invested in only one programming service must nonetheless set-aside a substantial portion of its channels for broadcast stations. "A 'solution' that preempts 20 channels in order to provide 'fair competition' on one plainly burdens more speech than is necessary". *Id.* Finally, if vertical integration were any problem to be redressed, must-carry is hopelessly underinclusive by failing to protect independent cable programmers in any way. Indeed, must-carry allegedly *protects* one class of non-vertically integrated programmers (broadcasters) by affirmatively *harming* another class of non-vertically integrated programmers (independent cable programmers).[50]

[50] Given this lack of fit, it is dubious that Congress even intended to address vertical integration issues through must-carry. In fact, "[t]he full committee rejected must-carry as a remedy to speculative allegations of program discrimination because, in its view, the must-carry remedy would not properly address the alleged discrimination". H.R. Rep. at 173 (additional views).

### B. The Must-Carry Provisions Do Not Protect Even Marginal Broadcast Stations In A Direct And Material Way.

The must-carry provisions are ill-designed to protect even marginal broadcast stations "in a direct and material way". *Turner*, 114 S. Ct. at 2470. Defendants have made no showing that those local broadcast stations that allegedly need the must-carry provisions experience any increase in viewership even after they force their way onto cable systems. The undisputed evidence demonstrates that they do not.[51] The point is quite simple: Television viewers do not want to watch bad programming. As the Government stated to this Court in 1994: "[i]f a commercial station lacks an audience, it eventually will fail, whether or not it is available to cable as well as non-cable households". Gov't App. Br. at 41 n.28; *see also* NAB Mo. to Aff. at 22 (Jan. 22, 1996) (must-carry could only "increase the likelihood" that some stations may survive). Thus, what is needed to address these stations' difficulties is a "must-watch" law, not a must-carry law.

Although this Court placed the burden on Defendants to establish that stations actually suffered severe economic injury as a result of cable operators' behavior, nowhere have Defendants made any systematic attempt to establish the absence of must-carry as the cause of a marginal station's failure. Instead, they presented to the district court roughly 300 specific cases where a broadcaster was denied carriage or moved to another channel by one or more of the cable systems in its ADI, claiming that each was a casualty of a

---

[51] Rather, the evidence demonstrated that these stations go from being the least-watched local broadcast stations to being the least-watched local broadcast stations on a cable systems. McLaughlin Aff. ¶¶ 2(b), 9-18 (J.A. 2171, 2175-79). There was no statistically significant increase in these stations' viewership after having been added to Time Warner's systems as a result of must carry elections. *Id.* Exh. 5 (J.A. 2188).



cable operator's anticompetitive behavior. The facts of each particular circumstance are immaterial given the absence of any genuine threat to the broadcasting system. *See supra* at pp. 12-25. Nevertheless, Time Warner rebutted their claims by investigating every one of the so-called "victims" of adverse cable carriage. Time Warner discovered that, in fact, from all of the approximately 300 alleged victims, only 15 commercial stations actually left the air and only 9 noncommercial stations actually alleged quantified financial harm that was not *de minimis*.[52]

## IV. THE MUST-CARRY PROVISIONS IMPOSE A SUBSTANTIAL BURDEN ON THE PROTECTED SPEECH OF CABLE OPERATORS AND PROGRAMMERS.

### A. Must-Carry Severely Restricts The Editorial Discretion Of Cable Operators.

Cable operators undeniably engage in protected First Amendment activity by selecting, editing, packaging, and (increasingly) creating programming services to provide their subscribers.[53] *See Turner*, 114 S. Ct. at 2456. To program its channels, a cable operator may select programming from among approximately 128 national cable networks, 40 regional cable networks, as well as any local broadcast stations within its reach, superstations, premium services, and pay-per-view. Defendants' Fact Response ¶ 107. As of October, 1994, 86% of the cable systems in the United States

---

[52] TWE Broadcast Station Rebuttal (J.A. 2274-80); TWE Reply Mem. in Support of Its Mo. for S.J., Exhs. A & B (June 30, 1995) (J.A. 2243, 2255) ("Rebuttal Charts").

[53] Cable operators are also programmers. They often create programming services (*e.g.*, Time Warner's NY1, a 24-hour news programming service focusing on New York City) that provide as much (if not more) programming responsive to local issues than broadcast stations electing must-carry. Collins Aff. ¶ 4 (J.A. 217).

provided fewer than 54 channels of service to their subscribers. *Id.* ¶ 112. The cable operator's goal is to fill its limited channel capacity with a diverse package of programming that appeals to the widest possible audience and thus attracts the most subscribers.

The must-carry provisions directly override the editorial discretion of cable operators by forcing them to dedicate finite channel capacity to broadcast stations that they might not otherwise carry—for the most part little watched UHF stations. The most direct measure of that harm is the number of all broadcast stations carried under the must-carry requirements, whether or not those stations were added after the implementation of must-carry. J.S. 91a (Williams, J., dissenting). In terms of First Amendment harm, there is no difference between a cable operator forced to carry a broadcast station and a cable operator indefinitely prevented from removing a broadcast station, just as there is no difference between a newspaper forced to carry another paper's columnist and a newspaper forever prohibited from removing that columnist.[54]

The must-carry provisions have clearly had a dramatic impact on the editorial discretion of all cable operators. The undisputed facts below indicate that between 7% and 13% of the average cable operator's channel capacity is occupied by must-carry stations. J.S. 91a; *see also* Peterman Decl., Exh. 2 (J.A. 1152-54).[55] In effect, the Government commandeers at

---

[54] The channel positioning requirements of must-carry also restrict the ability of cable operators to create the package of programming they believe will meet the needs of their subscribers. Ellis Aff. ¶ 4 (J.A. 1091-92); Gault Aff. ¶ 17 (J.A. 1097). Under the must-carry provisions, broadcast stations literally force their way onto a cable operator's basic tier of service and claim the most desirable channel positions on a cable system.

[55] Even based on Defendants' most conservative estimate, there are approximately 35,000 total cable channels occupied by must-carry stations. J.S. 19a (500,000 cable channels); J.S. 91a (7% of channels occupied).



least that percentage of a cable operator's speech on each system and substitutes its own preferred speakers. As Judge Williams recognized, "[t]his forced carriage—whether in the form of a required addition to a cable system (requiring the operator to eliminate programming) or a mandatory retention (preventing the operator from adding new programming)—is a tangible burden on operators' speech". J.S. 91a.[56]

### B. Cable Operators Cannot Meet Their Must-Carry Obligations Through "Unused" Channels.

The record demonstrates that at any point in time the vast majority of cable systems have no unused channel capacity, and that where there is excess capacity, it is quickly filled. The trend in the industry suggests that channel capacity will remain finite for the foreseeable future. For example, the average number of unused channels on Time Warner's cable systems in 1985 was approximately 1.18 channels, but in 1992, it was approximately 0.4 channels.[57] As Defendants' expert conceded, those cable operators who do have unused channel capacity do not leave it idle for long. *See* Noll Dep. at 258 (J.A. 459). They quickly fill those channels with the programming of their choice. Regardless of whether a

---

[56] The must-carry requirements have also placed a significant burden on the editorial discretion of Time Warner's cable systems. The record shows that nearly every Time Warner system (over 94%) carries one or more broadcast stations pursuant to the must-carry provisions. Those systems have had to drop programming on 74 channels and add 240 broadcast stations. On average, Time Warner cable systems are forced to set aside 10% of their channel capacity for must-carry stations. Ellis Supp. Aff. ¶ 4 (J.A. 1766).

[57] TWE's Third Supp. Resp. to Def. Inter. (Mar. 7, 1995) (J.A. 728). In 1992, for example, there were absolutely no extra channels on 88% of Time Warner's cable systems. In 1994, 92.7% of its systems had no unused channel capacity. Ellis Supp. Aff. ¶ 4 (J.A. 1766).

broadcast station is added to an open channel or to an occupied channel that requires a programmer to be dropped, cable operators are significantly injured by being required to add broadcast stations that in their editorial discretion they would not otherwise carry and by being constrained from dropping other broadcast stations that have elected must-carry.[58]

Although channel capacity has been increasing, cable operators will not be able to accommodate all programming services and broadcast stations that request carriage because of the basic problem of finite channel capacity. Defendants wrongly suggest that enormous technological advances will eliminate the problem. As the number of channels on cable systems increases, the number of programmers competing for carriage on those systems increases at a faster rate. Bigelow Aff. ¶ 5 (J.A. 1053).[59] For example, while channel capacity

---

[58] Defendants offered a survey that indicated that 51% of the cable systems have no excess capacity. *See* J.S. 90a (referring to Beta Research Corp. survey, compiled from 152 informal telephone interviews, *see* Plaintiffs' Fact Response ¶ 193). This contrasts with Plaintiffs' survey by Dr. Shapiro, which shows that two-thirds of cable systems in terms of subscribers are channel-locked (*i.e.*, have no available cable channels). Shapiro Decl. ¶ 11 (J.A. 659-60). Yet, even if the Defendants' survey were accurate, it nonetheless establishes that the majority of cable operators make editorial decisions in an environment of finite channel capacity. Moreover, "any station carried involuntarily blocks the cable operator's intended use of the channel, forcing it to make changes in its anticipated, if not current, programming selections". J.S. 94a (Williams, J. dissenting); *see also* Dressler Aff. ¶¶ 10-11 (J.A. 1087-88); Clouston Aff. ¶ 12 (J.A. 1059); Kinley Aff. ¶ 8 (J.A. 1130-31); Gault Aff. ¶¶ 4, 5, 16 (J.A. 1094-95, 1096-97).

[59] And Defendants' experts concede that the technological changes needed to increase channel capacity will take an extended period of time to implement and will not solve the finite capacity problem at any point in the foreseeable future. *See, e.g.*, Jackson Dep. at 120 (J.A. 470) (widespread digital technology is 15-20 years away); Shooshan Dep. at 163 (J.A. 479) (responding to whether there are more cable programmers than available channels: "I think that is true now; I think it was true in the absence of must-carry and I think it is likely to be true well into the future").



increased nationally on average by approximately 14 channels from 1985 to 1992, the number of cable programmers (which does not include broadcast stations) during that time grew by 25 channels, making the shortage of available channels more chronic than ever.[60] Thus, even as channel capacity increases, cable operators must exercise editorial discretion and choose from an ever-growing array of programmers and broadcasters to fill a finite number of channels.

### C. Must-Carry Substantially Burdens Programmers' First Amendment Rights.

Each time a cable channel is awarded to a broadcast station by government fiat, a cable programmer or other broadcaster is denied a potential venue for offering its speech to cable viewers. The harm caused to cable programmers by must-carry is real: 120 Time Warner cable systems alone reported dropping, repositioning, or refusing to carry a cable programming network because of the must-carry obligations.[61] Likewise, Time Warner has declined to launch or invest in numerous new programming services because the must-carry rules have tied-up channel capacity that otherwise would have been committed to those programming services. Bigelow Aff. ¶¶ 2-3 (J.A. 1052-53).

---

[60] Shooshan Decl., Attach. T (J.A. 750); Stipulated Facts ¶ 137 (J.A. 1245-46); Bigelow Aff. ¶ 5 (J.A. 1053); *see also* Defendants' Fact Response ¶ 107 (noting the "dramatic increase" in the number of cable programming networks since 1992). Moreover, as channel capacity increases, new services will compete for that capacity, including telephony, computer, and Internet services.

[61] Gault Aff. ¶¶ 19-420; Cottingham Aff. ¶¶ 6-123; Ellis Aff. ¶¶ 6-178; Cutler Aff. ¶¶ 6-134.

### D. Judge Sporkin Grossly Undervalued The First Amendment Harm To Cable.

Judge Sporkin's view that First Amendment injury is substantial only if cable speakers are no longer "healthy and expanding" (J.S. 18a) has never been the law. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Judge Sporkin also erred in limiting his inquiry to the number of must-carry stations added and the number of cable programmers dropped to make room for those stations. Yet even in so limited an inquiry, he further erred in concluding that the must-carry provisions have not significantly harmed the First Amendment rights of cable operators and programmers. Whether the must-carry provisions confiscate 10%, 8% or some smaller percentage of the average cable operator's channel capacity, they nonetheless cause thousands of real and individual infringements of speech. Judge Sporkin glossed over the fact that cable operators and programmers are suffering a First Amendment injury inflicted directly by Congress. That injury cannot be weighed against the alleged nonconstitutional, economic harm suffered by broadcasters in the private marketplace for speech. The core principle underlying the First Amendment is that public power—the State—poses the greatest threat to speech.

By focusing on industry averages—such as the total channel capacity of the Nation's cable systems (500,000 channels)—Judge Sporkin's First Amendment inquiry obscures the harm caused by must-carry to particular cable operators and programmers. As Judge Williams noted, the percentages offered by the Defendants lump together the few cable operators who may have dozens of vacant channels and the vast majority of cable operators who do not. Yet, "dozens of vacant channels on a handful of several-hundred-channel systems are obviously of no use to a constrained system of



50 channels that is forced to carry, for example, six must-carry stations (slightly under the weighted average)". J.S. 91a n.23 (Williams, J., dissenting). First Amendment rights belong to *actual* cable operators and programmers, not the "average" cable operator and programmer.[62]

## V. THERE ARE LESS RESTRICTIVE ALTERNATIVES THAT ARE NONETHELESS EFFECTIVE.

The record on remand indicates that there are less restrictive alternatives for achieving Congress' claimed interest. The must-carry regime is therefore unconstitutional on these grounds as well.[63]

**1. Subsidies.** If the local broadcasting system truly were in economic peril, the Government could have advanced its stated goals of preserving that system by directly subsidizing

---

[62] Judge Sporkin's analysis of the harm caused by the must-carry provisions is at odds with other parts of his opinion. For instance, when addressing the interests served by must-carry, Judge Sporkin credited the Government's anecdotes of the few marginal broadcasters who could not obtain carriage on cable systems without must-carry. He disclaimed any need to evaluate the harm suffered by the broadcast industry as a whole in the absence of the must-carry provisions. When evaluating the harm caused by the must-carry provisions to cable operators and programmers, however, he focused on industry-wide percentages, not actual instances of harm.

[63] Judge Sporkin rejected each proposed less restrictive alternative as "less effective" than must-carry. J.S. 22a-27a. Judge Sporkin, however, was able to conclude that these alternatives were "less effective" only because he adopted Defendants' reformulation of the governmental interest at stake—the maximum expansion of broadcasting. The problem with Judge Sporkin's approach is that it is essentially circular: If the Government is permitted to expand or contract the purported governmental interest at stake, then it can always boot-strap its way past the "less restrictive alternative" test. *Simon & Schuster*, 502 U.S. at 120. Moreover, Judge Sporkin never compared the harm caused by must-carry with its alleged benefits. Thus, he looked to only one side of the test.

the speech of all or a few broadcasters, which would not have curtailed the speech of cable operators and cable programmers. Congress already subsidizes noncommercial television stations. Indeed, the public broadcasters admit that an increase in their congressional appropriation would have neutralized the economic harm of the few carriage difficulties non-primary educational stations have ever experienced. *See* Downey Dep. at 132-33 (J.A. 343-44); Abbott Dep. at 169-70 (J.A. 510-11).[64] Congress could simply "[p]rotect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event". 114 S. Ct. at 2480 (O'Connor, J., dissenting). As the record below demonstrates, the number of broadcast stations that require the subsidy provided by must-carry to stay in business is exceedingly small. It is no answer to conclude, as Judge Sporkin did, that such a scheme might be difficult to administer.[65]

**2. Direct Regulation of Competition.** If anticompetitive behavior in cable carriage is perceived to be a problem, more vigorous enforcement of existing competition laws would be obviously less restrictive on the cable industry's speech than broad-based must-carry requirements, because the protection would be specifically targeted against alleged wrongdoers, not every cable operator in the country.[66]

---

[64] As Judge Williams has noted before, "Congress is free to subsidize favored speech if the market is too weak to sustain the quantity that Congress seeks". *Turner*, 819 F. Supp. at 62 (Williams, J., dissenting).

[65] In any event, if there is difficulty providing funds to the broadcasters in need, that cannot justify the government bestowing a favored position on *all* broadcast stations at the expense of *all* cable operators and programmers.

[66] Antitrust actions can be, and have been, brought by broadcasters against cable operators. *See, e.g., Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141 (5th Cir.), *cert. denied*, 449 U.S. 954 (1980); *WLIG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229 (E.D.N.Y. 1994); *Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333 (C.D. Cal. 1992); *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600 (W.D. Mich. 1989).



## VI. THE LOW POWER CARRIAGE OBLIGATIONS AND MARKET MODIFICATION PROVISIONS ARE CONTENT-BASED

This Court recognized in its earlier decision in this case that two provisions within Section 4 of the Act may be content-based, but reserved judgment so that the district court could consider the issue first. 114 S. Ct. at 2460 n.6. The first provision allows a low power broadcast station to qualify for must-carry in certain circumstances if the FCC determines, among other things, that it "would address local news and informational needs which are not being adequately served by full power television broadcast stations". 47 U.S.C. § 534(h)(2)(B). The second provision allows the FCC to alter a television market to include a station, particularly where the station "provides news coverage and issues of concern to such community . . . or coverage of sporting or other events of interest to the community". *Id.* § 534(h)(1)(C)(ii)(III). On remand, Plaintiffs argued that both provisions were content-based restrictions on speech. Judge Sporkin upheld the first on the ground that it was "viewpoint-neutral" and thus not subject to strict scrutiny. J.S. 30a. He did not even address the second provision.

Judge Sporkin was wrong to insist that strict scrutiny did not apply (and wrong to ignore the market modification provision entirely). As this Court's precedents make clear, a statute is content-based if it grants special rights to speakers based on the type of speech they offer, regardless of the viewpoint of that speech. Accordingly, the provisions at issue here trigger strict scrutiny because they favor a particular type of speech—for instance, local news and sports programming. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S.

221, 229 (1987) (tax exemption of religious, professional, trade and sports publications held content-based). Indeed, the express terms of the statute plainly call for the FCC to make content-related decisions when considering the eligibility of low power stations for must-carry status and adjudicating market modification petitions. The Government has never articulated a compelling interest supporting either provision. They must be stuck down.

## VII. THE DISTRICT COURT HAD JURISDICTION OVER TIME WARNER'S TAKINGS CLAIM.

The undisputed evidence establishes that the Government has confiscated approximately 10% of the capacity of Time Warner's cable systems by the must-carry provisions. Ellis Supp. Aff. ¶¶ 8-9 (J.A. 1767-68). The 1992 Cable Act explicitly requires that any constitutional challenge to the must-carry provisions—including a takings claim—must be brought before the three-judge district court. 47 U.S.C. § 555(c)(1). That grant of exclusive jurisdiction would appear to bar Time Warner from bringing a Tucker Act claim in the Court of Claims for compensation pursuant to 28 U.S.C. § 1491. Indeed, the Government insists that the three-judge district court—not the Court of Claims—has jurisdiction over Time Warner's takings claim.[67]

Time Warner's takings claim seeks injunctive relief against the enforcement of must-carry. Although injunctive relief is not appropriate "when a suit for compensation can be brought against the sovereign subsequent to the taking", *Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1016 (1984),

---

[67] "On the basis of the language of [§ 555], and in recognition of the fact that the House Committee specifically contemplated the possibility that the must-carry provisions would be subject to challenges under the Just Compensation clause, defendants interpret the Cable Act's judicial review provisions to grant this Court jurisdiction over these claims." Gov. Mem. in Supp. of Mo. to Dismiss at 44 n.36 (Feb. 12, 1993).



just compensation cannot be obtained here, because the injury to Time Warner far exceeds the $10,000 jurisdictional cap in the district court (28 U.S.C. § 1346(a)(2)). Nevertheless, the district court dismissed Time Warner's takings claim without prejudice to be raised at another time. J.S. 28a.[68]

Instead of squarely holding that Time Warner could (or could not) seek compensation in the Court of Claims despite the exclusive jurisdictional requirement of § 555(c)(1), the district court engaged in a purely circular argument: If a takings claim could be brought in the Court of Claims, then such a claim "would not necessarily invalidate the 1992 Cable Act in its totality", J.S. 28a; therefore, injunctive relief would not be proper, and resort to the three-judge court would not be necessary. The court simply ignored the problem created by the combination of the special jurisdictional provision of § 555(c)(1) and the $10,000 limit prescribed by § 1346(a)(2)—which was the basis of Time Warner's takings claim. The district court did not hold that the Court of Claims could, despite the special jurisdictional provision, award just compensation to Time Warner, which holding would be necessary to dismissing Time Warner's request for injunctive relief. Indeed, in dismissing Time Warner's claim without prejudice, the court provided that the claim could be refiled "before the appropriate forum", *id.*, without any guidance whatsoever about what that forum might be.

Finally, as a "more important" reason for its dismissal of the takings claim, the court voiced its concern that "we do not

---

[68] The court intimated, without holding, that Time Warner's failure to raise the takings claim before this Court may have waived it. *Id.* Time Warner, however, pointed out that it had not appealed the takings issue to this Court, because, as the district court had held, only the First Amendment issues—and not the takings claim—were the subject of the district court's first decision. 819 F. Supp. at 56 (Sporkin, J., concurring); *id.* at 67 n.10 (Williams, J., dissenting). Thus, the takings issue could not have been appealed to this Court, and hence cannot have been waived.

want to dilute the issues the Supreme Court has asked us to address with consideration of ancillary matters not expressly remanded to us". *Id.* The takings claim was not expressly remanded by this Court because it was not before the Court; it had not been previously decided by the district court. In any event, the district court's desire to avoid clutter is not an adequate basis for the dismissal of an otherwise meritorious constitutional claim.

**Conclusion**

For the foregoing reasons, the Court should reverse the judgment below and declare the must-carry provisions unconstitutional in their entirety. The Court should also remand Time Warner's takings claim to the three-judge district court for further proceedings.

April 26, 1996

Respectfully submitted,

BRIAN CONBOY
THEODORE CASE WHITEHOUSE
WILLKIE FARR & GALLAGHER
Three Lafayette Center
1155 21st Street, NW
(Suite 6000)
Washington, DC
20036-3384
(202) 328-8000

ROBERT D. JOFFE*
STUART W. GOLD
ROWAN D. WILSON
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1000

*Counsel for Appellant Time Warner Entertainment Company, L.P.*

**Counsel of Record*

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

---

NO. 95-992

TURNER BROADCASTING SYSTEM, INC., et al.,

Movants-Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Appellees.

## Certificate of Service

It is hereby certified that all parties required to be served have been served three copies of the Brief For Appellant Time Warner Entertainment Company, L.P., by hand or first-class mail, postage prepaid, as indicated on the attached list this 1st day of August 1996.

Theodore C. Whitehouse

1 August 1996

## Service List

(*) Drew S. Days, III
Solicitor General
United States Department of Justice
Tenth Street & Constitution Avenue, NW
Washington, DC 20530
Attention of Lawrence Wallace

(*) John R. Tyler
Theodore C. Hirt
United States Department of Justice
Civil Division, Room 1074
901 E Street, NW
Washington, DC 20530

(*) Daniel M. Armstrong
Office of the General Counsel
Federal Communications Commission
1919 M Street, NW
Room 602
Washington, DC 20554

(*) Carolyn F. Corwin
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
**Counsel For Association of America's Public Television Stations; Public Broadcasting Service; Corporation for Public Broadcasters**

(*) Bruce J. Ennis, Jr.
Jenner & Block
601 Thirteenth Street, NW
12th Floor
Washington, DC 20005
**Counsel for National Association of Broadcasters; Association of Independent Television Stations, Inc.**

(*) H. Bartow Farr III, Esq.
Farr & Taranto
2445 M Street, NW
Suite 225
Washington, DC 20037
**Counsel for National Cable Television Association**

(*) Albert G. Lauber, Jr., Esq.
Caplin & Drysdale
One Thomas Circle, NW
Washington, DC 20005
**Counsel for Discovery Communications and the Learning Channel**

(*) Bruce D. Sokler, Esq.
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
**Counsel for Turner Broadcasting System Inc., Et Al.; Arts Entertainment Network; Black Entertainment Television, Inc.; E! Entertainment Television, Inc.; Hearst/ABE Viacom Entertainment Services; International Family Entertainment, Inc.; National Cable Satellite Corporation; OVC Network, Inc.; The Travel Channel, Inc.; USA Networks**

Henry L. Baumann
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

William J. Brynes
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, VA 22203-1633
**Counsel for Community Broadcasters Association**

Paul Broyles
International Broadcasting Network
P. O. Box 691111
Houston, TX 77269-1111

John P. Cole, Jr.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, NW
Washington, DC 20006
**Counsel for Daniels Cablevision, Inc.**

Arthur S. Garrett, III
Keller and Heckman
1001 G Street, NW
Suite 500-W
Washington, DC 20001
**Counsel for National Rural Telecommunciations Cooperative**

Robert A. Garrett
Arnold & Porter
555 12th Street, NW
Washington, DC 20004-1201
**Counsel for The National Association of Tele-Communciations Officers and Advisors; National League of Cities; U.S. Conference of Mayors; National Association of Counties; American Public Power Association; City Of New York**

Philip R. Hocherg
Verner, Liipfert, Bernhard, McPherson & Hand
901 15th Street, NW
Washington, DC 20005
**Counsel for Encore Media Corporation**

James N. Horwood
Spiegel & McDiarmid
1350 New York Avenue, NW
Suite 1100
Washington, DC 20005
**Counsel for Alliance For Community Media**

Stephen J. Hyman
Levy, Rosenweig & Hyman
11 East 44th Street
New York, NY 10017

James H. Johnston
2000 M Street, NW
Suite 550
Washington, DC 20036
**Counsel for Atlanta Interfaith Broadcasters, Inc.**

Colby M. May
American Center For Law & Justice
1000 Thomas Jefferson Street, NW
Suite 304
Washington, DC 20007
**Counsel for Specialty Broadcasters**

Robert T. Perry
509 12th Street
Apartment 2C
Brooklyn, NY 11215
**Counsel for Paging Associates, Inc.; International Television Broadcasting, Inc.; Sandra Engle; TV 58 St. Louis, Inc.; Morningstar Communications; Zantech, Inc.; International Broadcasting Network; Sherjan Broadcasting Co., Inc.**

John B. Richards
Keller & Heckman
Suite 500 West
1001 G Street, NW
Washington, DC 20001
**Counsel for National Rural Telecommunications Cooperative**

Andrew Jay Schwartzman
Media Access Project
2000 M Street, NW
Suite 400
Washington, DC 20036
**Counsel for Media Access Project; Consumer Federation of America; National Council of Senior Citizens; Office of Communication of the United Church of Christ**

Paul J. Sinderbrand
Sinderbrand & Alexander
888 16th Street, NW
Washington, DC 20006
**Counsel for Wireless Cable Association International, Inc.**

Leslie F. Spasser
Constantine & Partners
909 Third Avenue
New York, NY 10022
**Counsel for Liberty Cable Co., Inc.**

Arthur B. Spitzer
American Civil Liberties
Union of the National Capital Area
1400 20th Street, NW
Washington, DC 20036

Kathleen M. Sullivan
Stanford Law School
Crown Quadrange
Stanford, CA 94305
**Of Counsel for the National Association of Broadcasters**

Paul E. Symczak
Corporation For Public Broadcasting
901 E Street, NW
Washington, DC 20004

Jane Tollinger
Hearst/ABC Viacom
Entertainment Services
34-12 36th Street
Astoria, NY 11106

Joseph Van Eaton
Miller & Holbrooke
1225 19th Street, NW
Suite 400
Washington, DC 20036
**Counsel for National Association of State Cable Agencies; City of Los Angeles, CA; Alliance for Community Media; Alliance for Communications Democracy; Richmond Power & Light; Media Access Project**

Alan S. Weitz
Ginsburg, Feldman & Bress
1250 Connecticut Avenue, NW
Washington, DC 20036
**Counsel for Liberty Cable Co., Inc.**

**(*) By Hand**